No. 11760

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY,
a corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as FRANCIS M. STEINBACH, and CAROLYN S. STEINBACH,

Appellees.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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JURISDICTION

This is an action on a marine insurance policy. It was commenced at law, (2) but with the filing of the reply (7) may be said to have crossed over to the equity side of the court. The plaintiffs are residents and inhabitants of Oregon and the defendant is a New Jersey corporation. The matter in controversy exceeds the sum or value of $3000 exclusive of interest and costs. The District Court had jurisdiction of this cause under U.S. C.A. 28: 41 (1). The

District Court of Oregon having once secured jurisdiction on the ground of diversity of citizenship did not lose that jurisdiction by the filing of the third party complaint. *Lilienthal v. McCormick* (C.C.A. 9), 117 Fed. 89, 96; *First National Bank of Salem v. Salem Capitol Flour Mills* (D. Ore.), 31 F. 580; *Division* 525 *v. Gorman* (C.C.A. 8), 133 Fed. 2nd 273. This Court has jurisdiction by virture of C.C.A. 28:225. The final judgment appears on page 53 and the notice of appeal on 55.

STATEMENT OF THE CASE

This suit is grounded upon a marine insurance hull policy covering the suction dredge WISHRAM. Undisputed evidence raises two issues upon this appeal, — the first relating to lack of ownership and insurable interest in the dredge on the part of the plaintiffs-appellees, and the second to unseaworthiness of the dredge at the start of the voyage on which it was lost.

The plaintiffs-appellees are the wives of John L. Steinbach and David E. Steinbach of Tillamook, Oregon. The defendant-appellant is a corporation engaged in writing marine insurance policies in Oregon, represented in Oregon by Addison P. Knapp Co., of which Addison P. Knapp was the head and Emmett Rathbun was a member of the firm and a marine surveyor.

The defendant-appellant, as third-party plaintiff, impleaded the third-party defendants, Otto Berg and Otto Berg, Jr., operators of the fishboat JULIA D, which was attempting to tow the dredge WISHRAM at the time of its loss, charging them with negligence and responsibility for the loss of the dredge, and charging a right of subrogation over in the event the court should find liability on the policy. (39) The District Court, however, refused to allow the issues between the defendant and third-party plaintiff and the third-party defendants to be tried at the same time as the issues between the plaintiffs-appellees and the defendant-appellant. This decision resulted in some prejudice to the defendant-appellant in respect to the second ground of this appeal, to-wit: the defective hawser with which the towage was attempted, because the issues in the two cases came together at this point.

The appellees filed their complaint on the law side in March, 1946, alleging that they were the owners of the dredge, that the policy duly issued and later was indorsed to cover towage of the dredge from Nehalem Bay to Tillamook Bay, Oregon, that the dredge was lost on this voyage through perils of the sea, and demanding judgment (2-4). Later they filed their supplemental complaint asking for attorneys' fees (5).

After the filing of the complaint, as the court will observe in the docket entries (67-68), motions and affidavits were filed, and the defendant-appellant

secured issuance of supoenas duces tecum and took the depositions of the plaintiffs and others in Tillamook, Oregon, on June 17, 1946 (Exhibit 7) (77).

These activities resulted in increased knowledge of the case by both parties. The appellant learned through the depositions that the appellees had never owned the dredge and had no insurable interest therein. The appellees learned that the requirement for the towage by the tug UMPQUA CHIEF in the endorsement extending the policy to cover the trip from Nehalem Bay to Tillamook Bay (Exhibit 26c, p 232) was an express warranty, and that the attempted towage by the fishboat Julia D was a breach of this warranty, and voided the policy at law.

Thereupon the appellees filed their reply (7-17) in which they charged that the endorsement was not in accordance with their understanding, and had been misdirected in the mail, and was not received until after the loss, and prayed (17) that the endorsement be reformed by striking therefrom the language: "in tow of the tug 'Umpqua Chief'."

Appellant then filed its amended answer (18-38), which is responsive to (1) the original complaint, (2) the supplemental complaint and (3) the reply.

In its amended answer, with respect to insurable interest, the appellant denied (18) the allegation of the complaint that the appellees owned the dredge, and pleaded (31-32) that one Hugh Corgan, known as Captain Corgan, purchased the dredge from the

government with money supplied by J. L. Steinbach and D. E. Steinbach, a portion of which they borrowed from Frances M. Steinbach upon their unsecured promissory note, and that Corgan, prior to the issuance of the policy, represented to agents of the appellant that the appellees owned the dredge. Consequently appellant alleged that at no time did appellees or either of them own any part of the dredge.

Touching the warranty in the endorsement that the towage was to be done by the tug Umpqua Chief, appellant alleged that this was inserted in the endorsement following a representation by Captain Corgan that the towage would be by the Umpqua Chief, and because this tug was approved by the Board of Marine Underwriters, whereas no fishboat was so approved for towage purposes (34-37).

In respect to the defective hawser, appellant pleaded (36) that the hawser used on the towage was borrowed by Captain Corgan from some person unknown to the appellant and was not a sufficient hawser for the towage, that these facts were known to Captain Corgan, and that because of these facts the dredge was unseaworthy at the start of the towage, in breach of the implied warranty of seaworthiness of the policy endorsement.

The case was tried without a jury upon the issues made by the complaint, supplemental complaint and reply of the appellees together with the

amended answer of the appellant. The Court made findings of fact (46) and conclusions of law (51) and entered a final judgment for appellees in the amount of $11,437.50 and $1500 attorneys' fees for a three-day trial (53). The appellant considers the trial court greatly in error in this judgment but does not seek again to raise the issues in this appellate court relating to the substitution of the fishboat Julia D, for the tug Umpqua Chief because the decision below on this point was based upon disputed evidence.

This appeal confines itself to the two issues about which there was no contradictory testimony—namely, lack of ownership and insurable interest by and in the appellees, and unseaworthiness of the dredge for the towage by reason of a defective hawser furnished by the dredge which its operators "borrowed" from the coast guard. On these issues the court's decision allowing plaintiff to recover on the policy raised direct questions of law.

At a pre-trial conference the exhibits were all marked for identification. No pre-trial order was entered. At the trial the exhibits were introduced in a body on the offer of the appellees (59-60, 75).

FIRST SPECIFICATION OF ERROR: APPELLEES NEVER OWNED THE DREDGE AND HAD NO INSURABLE INTEREST THEREIN, AND THE POLICY IS THEREFORE VOID

The District Court erred in holding that the appellees were the proper parties to sue on the insurance policy and in permitting appellees to recover in face of the facts that

1. **They were never the owners of the dredge;**
2. **They had no insurable interest in the dredge;**
3. **The dredge was never transferred to them by any effective conveyance or at all;**
4. **They were not the real parties in interest in the recovery;**
5. **The policy sued on was void for want of insurable interest in the appellee.**

Under this first branch of our case appellant will discuss together the above points which form the first eight points relied on in this appeal (58).

PLEADINGS AND FINDINGS

The only kind of insurable interest in the dredge which appellees have pleaded is ownership. The complaint alleges (2):

> "That during the times herein mentioned the plaintiffs were the owners of a suction dredge named 'WISHRAM'."

The amended answer in Paragraph I denies the above allegation (18). Appellant's affirmative allegations on insurable interest in its amended answer (31-34) charge the ultimate facts as shown by the evidence.

The issue is ownership.

The trial court found as a fact (47):

> "That the plaintiffs are and were at all times herein mentioned proper parties to insure a certain suction dredge named the 'Wishram'."

We need hardly point out that the above finding of "fact" includes no fact; it is the Trial Court's conclusion. It is at variance with the allegation of the Complaint that the appellees owned the dredge. This finding was prepared for the trial court by counsel for the appellees. The Court could not have found as a fact that appellees owned the dredge because the testimony showed that they never owned it or intended to own it.

STATEMENT OF FACTS

John L. Steinbach and David E. Steinbach are brothers and business partners. They live in Tillamook and for a long time have conducted a machine shop business under the assumed business name Steinbach Iron Works. Their assumed business name certificate (Exhibit 14, 226) shows that they are the only persons having an interest in this busi-

ness. The appellees, their wives, are respectively Frances and Carolyn Steinbach.

The dredge Wishram, built and owned by the government, was for sale by the army engineers at Coos Bay, Oregon, in June of 1946.

Hugh Corgan, referred to sometimes as "Captain" Corgan, had previously been in the dredging business and had known the Steinbachs for thirty years (119).

On May 30, 1945, Hugh Corgan, J. L. Steinbach and David E. Steinbach had a talk which resulted in a verbal deal confirmed by J. L. Steinbach by letter to Corgan dated May 31, 1945 (Exhibit 13) (225).

> "In line with what was talked yesterday it is our understanding that we will form a corporation with you, Dave, and I each holding one-third of the stock. Your son, Jimmie, will be given a share of stock by each of us although in order to make it come out right he should have four shares which would leave 32 shares to each one of us."

John L. Steinbach testified (105):

> "We intended to organize a dredging company with Dave Steinbach, Hugh Corgan and myself, to take over this dredge and operate it and, as the dredge earned money, the money that was advanced by the wife would be paid back, and then the dredge would become our property and each one of us would have a one-third interest."

This arrangement was made while the purchase

of the dredge was in course of completion. Captain Hugh Corgan made the purchase. He paid the money on May 25, 1945, and took title on June 6, 1945. The two War Department letters are set forth at pages 228 and 229. The document of title takes the form of a letter on the letterhead of the District Engineer, War Department (Exhibit 22). We reproduced it here because of its importance (229).

"6 June 1945.

"Captain Hugh Corgan,
2944 N. E. 68th Street,
Portland, Oregon.

Dear Sir:

Receipt is acknowledge of your certified checks for $1,000 and $4,500, full payment for the Dredge 'WISHRAM' and equipment at the Kruse & Banks Shipyard, North Bend, Oregon.

Upon presentation of a copy of this letter to the Resident Engineer, U. S. Engineer Office, Empire, Oregon, he will deliver to you or your authorized representative, the property comprising the sale.

Very truly yours,

/s/ HORACE H. PERSON,
Captain, Corps of Engineers,
Executive Officer."

Pursuant to this letter Captain Hugh Corgan took possession of the dredge at North Bend on Coos Bay, and thereafter retained title and possession.

Captain Hugh Corgan has a son named J. H. Corgan, sometimes called "Jimmy". A couple of months

after the purchase of the dredge and on July 23, 1945, Captain Corgan and his son formed a partnership under the name "Coast Dredging & Construction, Ltd." They filed their assumed business name certificate in Tillamook County (Exhibit 7 (3), p. 219), giving their post office addresses as Tillamook, Oregon, and reciting that they are the true persons conducting, having an interest in, or intending to conduct the business of Coast Dredging & Construction, Ltd.

Captain Corgan has never executed any instrumentment transferring the dredge to the appellees or to anybody else (Steinbach 99), nor is there any testimony of any attempted transfer by him, by bill of sale, or act or otherwise. At all times from the purchase of the dredge to its loss he maintained possession of the dredge in himself and his son and his business partnership Coast Dredging & Construction, Ltd. At the trial he disclaimed interest in the dredge but there is no evidence of any such disclaimer prior to the trial.

John L. Steinbach and David E. Steinbach, doing business as Steinbach Iron Works, furnished the money with which Captain Hugh Corgan bought the dredge, and the money with which he insured it in the names of the appellees under the pretense that it belonged to them, and operated it from the time of purchase to the time of its loss through himself, and his son, J. H. Corgan, operating as Coast Dredging & Construction, Ltd. They advanced the amounts

of the repair bills and did some of the work in their machine shop and advanced wages for the two Corgans. The amount of their expenditures, less some small returns, is shown to be $9,446.26 (Exhibit 7(4) p. 222). This Exhibit shows two pages from the ledger of Steinbach Iron Works, being the account therein of Coast Dredging & Construction, Ltd. (John L. Steinbach 106-108).

Of this money Steinbach Iron Works borrowed $2,925 from the appellee, Frances Steinbach, upon their unsecured promissory note signed by Steinbach Iron Works by J. L. Steinbach, D. E. Steinbach. Exhibits 11 and 14 to the Tillamook depositions, Exhibit 7, are set forth on page 223 of the transcript (John L. Steinbach, 93 and 95). The ledger page of Steinbach Iron Works on page 223 headed "Frankie", meaning Frances M. Steinbach, refers to the same borrowing as is evidenced by the promissory note on page 223. Prior to the loss of the dredge Steinbach Iron Works made payments on the note to the extent of $1,275.00, leaving a balance of $1,650.00 due thereon at the times of the loss and the trial (John L. Steinbach, 96). The loss of the dredge will make no difference to Frances Steinbach in regard to her collection of the balance due on this promissory note. John L. Steinbach made that entirely clear. We quote (96-97):

> "Q. That promissory note to your wife is entirely unsecured, is it not? A. Right.
> Q. Never has been secured? A. No.

Q. When you and your brother borrowed that money from your wife, you expected to pay it back, didn't you?

A. Well, we expected to pay it back, and we didn't get it all paid back, when the dredge was in operation the dredge was to pay it back, from earnings of the dredge.

Q. You are going to carry out that intention and pay the amount of that note back? A. Yes.

Q. You are going to pay her all the $1650 you owe her? A. We are.

Q. You are going to do it regardless of how this case comes out? A. We are.

Q. That money that your wife loaned you came from her separate earnings and savings? A. It did.

Q. Her earnings teaching school?

A. Yes.

Q. As far as the loss of this dredge is concerned and this outstanding insurance policy, it won't make any difference whether you collect that money, or whether your wife collects that money as a result of this lawsuit or not; she is going to get $1650, isn't she? A. She sure is.

Q. Then, as far as the loss of the dredge is concerned, she is going to get the $1650 just the same with the dredge lost as if it had not been lost, isn't she? A. Absolutely."

The appellee Carolyn Steinbach furnished no loan, money or money's worth toward the dredge. Appellees did not put her on the witness stand, but she so testified in Tillamook, June 17, 1946 (Exhibit 7).

The army engineers delivered to Captain Hugh Corgan his document of title to the dredge, Exhibit

22 (229), on or about the date it bears, namely, June 6, 1945, at the Pittock Block, Portland, Oregon (Corgan 121). John L. Steinbach was with him at the time and Corgan handed the letter to Steinbach, who put it in his pocket (Steinbach 84; Corgan 120-121).

The two then went to Addison P. Knapp, Agent of the appellant insurance company, to arrange a policy of insurance covering the dredge. They wished a policy to permit towage from Coos Bay to Nehalem Bay followed by a lay up rate there until they should be ready to work the dredge. Mr. Knapp told them it would be necessary to get a clearance from San Francisco on the rate. Valuation was tentatively fixed at $12,500.00. He also explained that a survey by Robert Banks, Coos Bay representative of the Board of Marine Underwriters, would be necessary "as to the dredge and the towing vessel" (Knapp 194-196). Mr. Banks then surveyed and approved the dredge and the tug Umpqua Chief, which made the towage to Nehalem Bay. The policy issued dated June 6, 1945.

Let us describe the policy before we explain how it came to be made in the names of the two appellees. A copy of as much of the policy as is material to this case appears in the transcript (63-67). The original policy is a part of the record in this court as Exhibits 23, 24b and 26c. Attached to the regular policy form is American Hulls (Pacific) 1944 endorsement, which by its terms is substituted

for the policy form except for provisions required by law to be inserted in the policy (66). This endorsement is extremely lengthy and nearly all of the clauses of the endorsement have no bearing on the issues of this case, hence the abbreviation of the policy for printing in the record.

The policy provided for a lay up rate after its attachment and during the time the dredge remained at Coos Bay, followed by a rate of $1250 for the towage to Nehalem Bay, of which $1062.50 was to be returned on safe arrival (Knapp 196). Upon arrival the company charged an operating premium at Nehalem Bay (Exhibit 24a and b) and returned $415.74, being the above $1062.50 less the lay up premium at Coos Bay and the operating premium at Nehalem Bay. Addison P. Knapp Co. paid this $415.74 by its check to the appellees. Carolyn Steinbach, not having herself put out any money, endorsed the check and delivered it to Frances Steinbach, who cashed it and kept the money. Steinbach Iron Works entered the amount to their own credit on their "Frankie" account with Frances Steinbach (223), and to the credit of Coast Dredging & Construction, Ltd., in their dredge account with that firm (222) (John L. Steinbach, 110).

On October 24, 1945, the endorsement issued purporting to cover the towage from Nehalem Bay to Tillamook Bay by the Umpqua Chief. This was the towage attempted by the fishboat Julia D, resulting in the loss of the dredge. The premium for this

towage was the same as for the former towage, $1250, less $1062.50 upon safe arrival. The company received only the different between the last two figures, namely, $187.50. This sum the company attempted to return (Exhibit 27b; 233) when it repudiated liability on the ground that the towage was attempted by the fishboat Julia D instead of by the tug Umpqua Chief (Appendix C). Honorable Frank J. Lonergan, who first represented the appellees, returned this check to Addison P. Knapp Company (235) and the check was the subject of a later letter written by the writer of this brief to Judge Lonergan (236-237). Appellant paid the sum of $187.50 into court on or about May 21, 1946, with its first answer, and about a month later, through the Tillamook depositions, learned of the want of insurable interest of the appellees.

The policy insures the appellees and nobody else, and insures them as *owners* of the dredge and in no other capacity. It provides that it (62-63)

> "does insure Francis M. Steinbach and Carolyn S. Steinbach for account of themselves, loss, if any, payable in funds current in the United States to assures, (assureds) or order."

The American Hulls (Pacific) 1944 endorsement provides that it is (64):

> "To be attached to and form a part of Policy No. PC50295 of the Universal Insurance Company, dated June 6, 1945, Francis M. Steinbach and Carolyn S. Steinbach for account of them-

selves but subject to the provisions of this policy with respect to change of ownership.

Should the vessel be sold or transferred to other ownership or chartered on a bareboat basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become cancelled from date of such sale, transfer, charter or requisition. . . . This insurance shall not inure to the benefit of any such charterer or transferee of the vessel . . ."

It will be recalled that when John L. Steinbach and Captain Hugh Corgan went to Addison P. Knapp's office to negotiate the issuance of this policy of insurance, they had in the pocket of Mr. Steinbach Exhibit 22 (229), being the letter from the government engineers which operated as a transfer of the dredge from the United States to Captain Corgan (Corgan, 133).

Several details were discussed at the meeting, and Mr. Knapp asked in whose name the policy was to be written. Captain Corgan indicated that Mr. Steinbach would answer this question and Mr. Steinbach gave the names of the two ladies, the appellees herein (Knapp 197). Mr. Knapp stated that this was a little unusual and asked the reason. Mr. Steinbach stated (Knapp 197-198):

". . . that the dredge had been bought or was being purchased in the names of these two women. . . . They simply said the dredge was being purchased in the names of the women, with their money."

Cross-examined as to whether he pursued the inquiry any further, Mr. Knapp said (Knapp 205):

> "I did not. In the insurance business we make a custom of accepting information of that sort.
> Q. I didn't get part of that.
> A. In the insurance business we make it a practice to accept such statements at their face value."

Mr. Steinbach told the same story. He said (Steinbach 88-102):

> "I told Mr. Knapp that this dredge had been bought for the benefit of the Steinbach wives and to make the insurance out to Carolyn and Frances Steinbach."
>
> * * *
>
> "Is it not a fact that you told them that the ladies owned the dredge?
> A. Yes."

Captain Corgan's direct examination on this subject on pages 123 and 124 is of interest. He testified, as did Mr. Knapp and Mr. Steinbach that Mr. Steinbach instructed Mr. Knapp to issue the policy to the two ladies.

> "You did not claim to own any interest in it then, did you?
> A. No." (123.)

Inasmuch as the government engineer's letter transferring title to Captain Corgan had just been delivered to him in Mr. Steinbach's presence, this was a failure to disclose to Mr. Knapp a circum-

stance material to the risk. Indeed, it was a direct misrepresentation of the fact that Captain Corgan was interested and that he held the legal title to the dredge.

Captain Corgan testified that Mr. Steinbach stated that he did not want Steinbach Iron Works connected with the ownership of the dredge, but that he did not disclose the plan to form a corporation and divide the stock three ways (Corgan 136, 137).

The Trial Court took a hand and asked (123 and 124) three questions attempting to elicit from Captain Corgan testimony tending to show knowledge on the part of the insurance company. We pass over the obvious point that these questions were improper in that while Captain Corgan could testify to what he or Mr. Steinbach *told* the insurance company agents, he could not testify as to what they *knew*. Captain Corgan's answers to the Court's questions were not informative.

Neither the efforts of counsel for the appellees nor those of the court brought forth from Captain Corgan any testimony that he or Mr. Steinbach told Mr. Knapp anything contrary to Mr. Steinbach's statement that the ladies owned the dredge and that the policy was to be issued to them.

There was a reason why Mr. John L. Steinbach wanted the policy issued in the names of the two ladies, and this was because in the event of a loss, the insurance money would be in the hands of the

two ladies, and the creditors of the Steinbach Iron Works would be hindered and delayed. There is no doubt that the two Steinbach brothers were to get the benefit of the bulk of any insurance money that might be paid. Mr. J. L. Steinbach said (88):

> "I was interested in just the insurance being enough to cover, to protect us for the amount that we had paid for it. I thought we should insure it for not over $10,000 and probably $8,000. We were kind of short of money."

The pretense that the Steinbach women were to be considered the owners of the dredge, and were to collect the insurance, if any, in the event of the loss of the dredge came about through talks between the two appellees and their respective husbands. Mr. Steinbach was asked, on direct examination, by the appellees' counsel whether there was any discussion between the Steinbachs as to who was to hold title to the dredge. The question being sufficiently leading to indicate what was to follow, appellant entered an objection (85) on the ground that a conference between members of the Steinbach family could not transfer title to the dredge and that such a conference would not be binding upon the appellant (85). This objection was thereafter renewed at all times when this subject arose in the record, and by the consent and understanding of the Trial Court, the objection of the appellant became a continuing one (60, 76, 85, 86, 112, 176). This objection is now before the Appellate Court in

Point 1, in which appellant asserts that the District Court erred (58)

> "I. In admitting parol evidence as tending to show transfer of the dredge."

The Court admitted, over appellant's objection the testimony of the Steinbachs' about these family conferences and the story told was substantially this: During the war the Steinbach Iron Works got into the business of building tugboats for the British Government, which was unprofitable. In June of 1945, they had not received any settlement from the Maritime Commission, and at that time the Steinbach Iron Works was in a rather precarious financial condition. This was when Captain Corgan bought the dredge. By the time the appellant took the depositions of the members of the Steinbach family (Exhibit 7) in June, 1946, the settlement had been made (100). When they bought the dredge in June, 1945, they claimed $29,000 from the Maritime Commission, and owed $16,000. Their creditors had waited 27 months, and they did not want these creditors to get any money from the dredge (101). Mr. David E. Steinbach described the situation as it was when the dredge was bought (113).

> ". . . we also had loans from two private men there in Tillamook. One happened to be the President of the First National Bank. Like my brother said, every time he went in the First National Bank he wanted to know how soon we were going to pay him back. So, what we did, we thought that would be the best way, if we

were going to purchase this dredge, to keep it out of the account of the Steinbach Iron Works account.

Q. Then what did you agree to do about the ownership of the dredge?

A. Well, we agreed to put it in the ladies' names."

The two appellees and their husbands, according to the testimony of all of them, had a family conference and agreed that the dredge should be considered owned by the ladies, or, at any rate, that they should insure it. John L. Steinbach testified (103):

"Q. The only basis upon which you make any claim that these two ladies owned the dredge was the family conference among members of the Steinbach family?

A. That is right.

* * *

Q. Did Captain Corgan attend this conference?

A. No.

* * *

Q. Then the agreement by which you claim the ladies came to own the dredge was entirely an agreement made, without writing, between the four members of the Steinbach family?

A. That is right."

When Mr. Steinbach and Captain Corgan told Mr. Knapp to issue the policy to the two ladies, they withheld from him some very important information.

1. They neither exhibited to him nor told him the contents of the letter which Mr. Steinbach then had

in his pocket by which the U. S. Engineers had transferred the dredge to Captain Corgan (Knapp 198; J. L. Steinbach 102). Asked if he would have issued the policy in the names of the ladies had he received this information Mr. Knapp said (198):

> "No, I would have told them that the proper way to insure the dredge would be in the name of whoever might hold title to it."

2. They did not tell him that Steinbach Iron Works had furnished money for the purchase of the dredge (198).

3. They did not tell him that the reason for insuring the dredge in the names of the ladies was to keep the money away from the creditors of the Steinbach Iron Works (198).

4. They did not tell him of the purpose to organize a corporation to own and operate the dredge, in which Captain Corgan and each of the two Steinbach men was to have 32%, and J. H. Corgan 4% (199).

Mr. Knapp did not learn that the two ladies did not own the dredge until long after the loss and after the taking of the depositions in Tillamook in June, 1946 (Knapp 199,204). He then received this information from the writer of this brief.

Emmett Rathbun, Marine Surveyor with the Addison P. Knapp Co., surveyed the dredge about the middle of October, 1945, preparatory to the then

proposed towage from Nehalem Bay to Tillamook Bay. He included in his report a statement that the dredge was owned by J. H. Corgan. He did this only because he was dealing with Corgan and never looked into the papers to see who really owned it (Rathbun 215). Mr. Knapp saw this report and, no doubt, read the statement in it that J. H. Corgan was the owner. He paid no attention to this statement (Knapp 206). Five months before this Mr. Knapp had issued the policy to the two ladies upon Mr. Steinbach's representation that they were the owners. The purpose of the Rathbun survey was to ascertain the physical condition of the dredge for the towage and not to investigate the title. There was no occasion for Mr. Knapp to be concerned by Mr. Rathbun's statement that J. H. Corgan owned the dredge. J. H. Corgan is the son of Captain Hugh Corgan.

Exhibit 7 (4) (222) taken in conjunction with Exhibit 7 (11 and 14) (223) is a significant and revealing document. The three ledger sheets are from the same ledger, namely, the ledger of Steinbach Iron Works. The sole partners in this firm are John L. and David E. Steinbach (226). The bottom ledger sheet on page 222 is a continuation of the dredge account commenced on the top ledger sheet on 222, the two sheets together forming the complete account. This is an open account with Coast Dredging & Construction, Ltd. The sole partners in Coast

Dredging & Construction, Ltd., are Hugh Corgan and his son, J. H. Corgan (219).

In the ledger account on page 222 the debits represent charges by the two Steinbachs against the two Corgans and the credits are the opposite, namely, credits to the Corgans as against the Steinbachs. The debits are sums paid out by the Steinbachs for the purchase price of the dredge, insurance premiums, repairs, including freight on parts, and wages to the Corgans. The credits are a return premium received from Mr. Knapp of $415.74 and a small sum paid by Coast Dredging & Construction, Ltd. The balance of this open account against the Corgans and in favor of the Steinbachs is $9446.26.

The court will notice that included in the charges by the Steinbachs against the Corgans are the various amounts borrowed by the Steinbachs from Frences Steinbach—$1,000, $675 and $1,250, aggregating $2,925. These three items will be found charged in favor of the Steinbach men and against the Corgans on the ledger page at the top of 222, and against the Steinbach men and in favor of Frances Steinbach on the ledger page on 223.

In the account with Frances Steinbach on 223, the return premium of $415.74 appears as a credit to the two Steinbach men because this check was cashed by Frances Steinbach. The other credits on this account appear to be by checks of the Steinbach Iron Works, the numbers of which are shown on the

ledger sheet, payable to or for the benefit of Frances Steinbach for which the Steinbach men took credit on the account.

To summarize, the relationships to the dredge are as follows: Hugh Corgan owned the dredge, and the two Corgans possessed and operated it. The Steinbach men loaned money on an open account to the Corgans to buy and operate the dredge, and borrowed part of that money from Frances Steinbach, on a note account in order to lend it to them. Carolyn Steinbach had nothing at all to do with any of these money matters.

The three members of the Steinbach family who gave testimony injected into the record a good deal of sentimental talk designed to elicit the sympathy of the Trial Court and show him that the Steinbach men treat their wives generously, and that among the four members of the family a happy communal spirit prevails with respect to everybody's property. For instance, Frances Steinbach testified, on cross examination (178):

> "They are all in the family. What difference does it make whether the debt is paid or not?"

This is not just what she said when her deposition was taken in June, 1946 (180):

> "Q. You made it *before* they were honest men and good business men and you felt they would pay you back, is that right?
> A. Yes."

(The word in italics should be "because". See Tillamook depositions, Exhibit 7, p. 38, line 14.)

David E. Steinbach testified (112) that all four of the Steinbachs "contributed" to the purchase price of the dredge. Frances Steinbach made the loan to Steinbach Iron Works that has been described. Carolyn Steinbach neither loaned nor paid anything. She so testified when her deposition was taken (Exhibit 7) and appellees did not put her on the witness stand at the trial. What Mr. Steinbach means is that generally the success of the dredge enterprise would contribute to the fortunes, prosperity and happiness of all of the Steinbachs. John L. Steinbach offered the pleasing but untrue doctrine: "Well, what's mine is hers" (99).

This Court cannot properly allow expressions such as these to govern its consideration of this case. This Court has a duty to construe the Oregon Statutes and give effect to the applicable decisions, and cannot allow its judicial determinations to be governed by such sentimental beatitudes as appear in this record.

POINTS, AUTHORITIES AND ARGUMENT

1. The dredge WISHRAM was a vessel and could be transferred only by a writing signed by the transferer under the Oregon statute. The dredge was not a "vessel of the United States" and, therefore, its

transfer was governed by the Oregon statute and not the United States statute. Parol evidence of transfer was erroneously received.

O. C. L. A. 2-907.

46 U. S. C. 921.

City of Los Angeles vs. U. S. Dredge Co. (C. C. A. 9), 14 Fed. (2) 365.

North River Coal Co. v. McWilliams (S. D. N. Y.), 28 Fed. (2) 513.

Ohl vs. Eagle Insurance Co. (C. C. Mass.), 18 Fed Cas. 10472-3.

Stockdale vs. Dunlop, 6 M. & W. 224; 151 Reprint 391.

The dredge WISHRAM was a "vessel". This has been clearly held by Judge Hunt in *City of Los Angeles vs. U. S. Dredge Co.* (C. C. A. 9), 14 Fed. (2) 365. If the dredge was a "vessel of the United States" any conveyance must be in writing under the Federal Ship Mortgage Act, 46 U. S. C. 921. If it was not a "vessel of the United States" any conveyance must be in writing under the Oregon statute, O. C. L. A. 2-907. *North River Coal & Wharf Co. vs. McWilliams Bros.* (S. D. N. Y.), 28 Fed. (2) 513.

The dredge was not a "vessel of the United States" within the meaning of 46 U. S. C. 921 because it was

not registered or enrolled. Therefore, it was governed by the Oregon statute 2-907 as to transfers. Title to the dredge passed from the Government to Captain Hugh Corgan by the letter (229), and remained there to the time of the loss. The Oregon statute of frauds is as follows:

> "2-907. A sale or transfer of a vessel is not valid unless it be in writing and signed by the party making the transfer."

The appellees never owned the dredge, as they alleged in their complaint, nor did their husbands own it. The Trial Court erred in admitting evidence that title came into the appellees through family conferences of the Steinbachs in which Captain Corgan was not even present. That Captain Corgan does not *now* claim any interest is beside the point.

Ohl vs. Eagle Ins. Co. (1826) (C. C. D. Mass.), 18 Fed. Cas. No. 10,472 and No. 10,473. Ohl procurred a policy of insurance in his own name and after a loss brought suit. To establish his ownership of the schooner he produced a bill of sale from Hendricks to Ohl and Remington and a certificate showing registry in the names of Hendricks and Remington. He then sought to prove by parol that the purchase had been made on his sole account. This evidence was objected to and Mr. Justice Story said in his opinion on the Circuit:

> " 'I am of opinion that the evidence is not admissible. I think that a title to a ship cannot pass by parol when she is sold to a purchaser.

> The general maritime law requires a ship to have some written document of ownership at least when sailing on the ocean; and there is nothing in our jurisprudence which dispenses with such a written instrument of transfer. Lord Stowell has observed (The Sisters, 5 C. Rob Adm. 155 (438)) that a bill of sale is 'the universal instrument of transfers of ships, in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance known only to the law of England.'
>
> * * *
>
> " 'I agree that an equitable interest is insurable. Whether it binds the underwriter to answer for any loss, when its peculiar nature is not disclosed and the terms of the insurance are strictly applicable to legal interests; and whether there would be any difference in such case, if the disclosure were not material to the risk, are questions upon which I give no opinion * * * Whatever may be the general rule on this subject, in ordinary cases, I am of opinion that an insurance on a ship is to be deemed, unless a special explanation is given, to be an insurance on the legal interest and not on a mere equitable interest as contradistinguished from the legal interest of the ship; and at all events not an insurance on a mere private, verbal trust, in opposition to the ship's papers and the overt acts of the parties. If such an interest is to be insured it ought to be disclosed'."

Justice Story then points out that the nature of the title must necessarily be material to the risk, asking what rights of salvage would the company have in the event of an abandonment by a (parol) owner,

not joined in by another whose title stands on a different footing.

2. A marine insurance policy is void where it purports to indemnify an assured against loss or damage to property in which the assured has no insurable interest.

7 O. C. L. A. 101-1119.

7 O. C. L. A. 101-1120.

Chase v. Hammond Lumber Co. (C. C. A. 9, 1935), 79 Fed. (2) 716.

Lowry v. Conn. Fire Ins. Co. (C. C. A. 2, 1934), 70 Fed. (2), 324, Rev. EDNY. 5 Fed. Supp. 325, Cert. Den. 293 U. S. 576.

In *Chase vs. Hammond Lumber Co.*, 79 Fed. (2) 716, the Ninth Circuit said:

> "It is an elementary principle of marine insurance law that insurance cannot be created against injury to property in which the insured has no insurable interest and, as we have pointed out, no insurable interest of the Hammond Lumber Company in the Dolphins and light is alleged, * * *"

On December 21, 1906 an Act was adopted in Britain to codify the law relating to marine insurance (6 Edw. 7, c. 41). In 1921 the Oregon legislature

adopted an Act for the same purpose (Laws 1921, ch. 354). The Oregon Act is almost an exact copy of the English Act; for the purposes of the present point, the two may be regarded as substantially identical both in wording and in meaning. The body of the policy involved in this case contains the usual provision:

> "This contract shall be governed by the law of the United States of America as to its validity and the legality of the venture. It is otherwise subject to and shall be governed by English Law and Usage as to liability for and settlement of any and all claims."

The American Hulls (Pacific) 1944 endorsement does not contain this or similar language and provides at its end that (66):

> " 'The terms and conditions of this form are to be regarded as substituted for those of policy form to which it is attached, the latter being waived, except provisions required by law to be inserted in the Policy'."

While the Oregon Law covers this case, the English Statute and applicable decisions may also be considered as related. The pertinent parts of the Oregon statutes are published in Appendix A to this Brief.

Sections 101-1119 and 101-1120 may be regarded by your Honors as fully disposing of this case. Section 101-1119, provides that every wagering contract of marine insurance *is void;* and that a wagering

contract is one where the assured has *no insurable interest* and does not expect to acquire one. Section 101-1120 defines insurable interest as a legal or equitable relation to the adventure under which one would be benefited by safety or prejudiced by loss.

Neither of the appellees had any legal or equitable relation to the dredge; they had a sentimental interest in it, but that is all. Carolyn Steinbach neither paid nor received any money. Frances Steinbach loaned money to her husband and his brother to help purchase and insure the dredge, but she received their unsecured note for this loan and they state that they will pay her back regardless of the outcome of this case. Neither lady stands in a legal or equitable relation to the dredge by which she would have benefited by its safe arrival or by which she is damaged through its loss.

Expectations for the future were that the dredge be owned by a corporation whose stock was to be owned by the two Steinbach men and the two Corgans.

The ladies neither owned at the time of the loss nor anticipated owning the dredge at any time in the future.

3. Since the statute of 19 Geo. 2, c. 37, 1751, outlawing gambling policies, it has been necessary, in an action on a marine insurance policy, for the plaintiff to allege facts showing ownership or other character of insurable interest.

Dollar S. S. Co. v. Maritime Ins. Co. (N. D. Cal.), 149 Fed. 616.

Hardwick v. State Ins. Co., 20 Or. 547, 26 Pac. 840.

Chrisman v. State Ins. Co., 16 Or. 283, 18 Pac. 466.

Cousins v. Nantes, 3 Taunt. 511, 128 Reprint 203.

In *Cousins v. Nantes,* 128 Reprint 203 it was held (207):

> "On a wagering policy, there is no salvage, no abandonment, no return of premium for short interest * * * but it is the contrary on a policy on interest; * * *. Upon such a policy, therefore, we are of opinion, according to the practice of 60 years since the statute (19 Geo. 2, C. 37) that it is necessary to allege the interest in the declaration, in order that the defendant may see what that interest is, and in whom it is."

In an action to recover upon a fire insurance policy, the Oregon Court said, *Chrisman v. State Ins. Co.,* 16 Or. 283:

> "The plaintiff's interest in the property covered by the policy, then, being one of the essential facts upon which his right to recovery depends, it must be alleged in the complaint; and without such allegation the complaint is fatally defective."

Gambling marine insurance policies were outlawed nearly 200 years ago. It follows that since that time it has been necessary to aver in a complaint upon a marine policy the facts showing the insurable interest of the plaintiff.

The appellees have alleged ownership and this is the character of interest upon which the policy was issued (64). However, the record is destitute of evidence tending to show ownership and, indeed, the evidence shows without dispute that appellees never owned the dredge and never expected or intended to own it. A fatal variance exists between pleading and proof.

4. The burden is upon the assured of proving the same insurable interest alleged in his complaint—in this case, ownership.

Oatman v. Bankers, etc., Assn., 66 Or. 388, 133 Pac. 1183, Reh. den., 134 Pac. 1033.

Cohen v. Hannam, 6 Taunt, 101, 128 Reprint 625.

Catlett v. Pacific Ins. Co. (C. C. N. Y.), 5 Fed. Cas. No. 2517.

Bell v. Ansley, 16 East 141; 104 Reprint 1042.

In *Bell v. Ansley,* 16 East. 141, 104 Reprint 1042, the plaintiff sued to recover on a cargo policy alleging sole ownership of the goods in himself. The policy recited ownership in both plaintiff and his brother William Bell, and at the trial the evidence supported the policy.

The Court held that this variance between pleading and proof was fatal:

> "This was a question of variance."
>
> * * *
>
> "* * * we are of opinion * * * the underwriters are entitled to have it stated truly upon the record whose interest the policy was to protect."
>
> * * *
>
> "It certainly is material also, in point of public policy and convenience, that a disclosure of the true interest meant to be covered by the policy should be made * * *."
>
> * * *
>
> "Upon the ground, therefore, that it is a material allegation, namely: the allegation on whose account and for whose use and benefit a policy is made; and that the statement ought to be according to the truth; we are of opinion that the variance in this case was fatal, and that the rule for a non-suit should be made absolute."

In a suit on a marine insurance policy, the plaintiff necessarily undertakes the burden of proving his insurable interest as alleged in his complaint, as he does the other material allegations of the complaint. The appellees have offered no evidence tend-

ing to prove their allegation of ownership. The evidence is to the contrary.

5. Where an assured causes a policy of marine insurance to be issued purporting to indemnify him *as owner* in respect to loss or damage to property of which, in truth he is *not the owner,* the policy is void.

> *Curacao Trading Co. v. Federal Ins. Co.* (S. D. N. Y.), 50 Fed. Supp. 441. Aff'd C. C. A. 2, 137 Fed. (2) 911. Cert. Den., 321 U.S. 765.
>
> *National Oil Transp. Co. v. U. S.* (D. C. La., 1927), 18 Fed. (2) 305.
>
> *Vancouver Nat. Bank v. Law Union Crown Ins. Co.* (C. C. Or., 1907), 153 Fed. 440.
>
> *Finlon v. National Union Fire Ins. Co.,* 65 Or. 493, 132 Pac. 712.

In *Curacao Trading Co. v. Federal Ins. Co.,* 50 Fed. Supp. 441, the plaintiff sued on a floating import policy to recover for physical loss of a quantity of cocoa beans in a warehouse. The beans were determined to belong to others than plaintiff. The District Court said (443):

> "The certificates issued to plaintiff gave him no interest in any cocoa beans in the warehouse. They were nulities as documents evidencing any right to possession or ownership of any of

> the merchandise described in them. * * * Another owned all of the merchandise in the warehouse and had a right to immediate possession absolute as against this plaintiff."

In *Vancouver National Bank v. Law Union & Crown Ins. Co.,* 153 Fed. 440, 453, it was held that where one Cone, indebted to the bank had taken a policy of insurance as owner with loss payable to the bank and then subsequently, but prior to its loss by fire, conveyed the insured property to a corporation the policy was avoided. Judge Wolverton said:

> "So that there can be no question, under the contract and under the evidence, that the sale was absolute and not conditional, that it took effect at once to transfer the equitable title, and that the loss by the fire fell upon the Oregon Fir Lumber Co., and not upon Cone, and as the contract had the effect to violate the condition of the policy, it relieved the insurance company of all liability thereunder."

In *Finlon v. National Union Fire Ins. Co.,* 65 Or. 493, the plaintiff, having only a lease with an option to buy, procured a policy of fire insurance as owner. A loss occurred and the Court said:

> "The lease, with the lessee's option to purchase, does not in any sense of the word vest him with fee simple title to the land on which the insured building stood. There being no agreement to the contrary indorsed upon the policy or added thereto as required by the statute, that instrument was shown to be void, making plaintiff's case amenable to the objec-

tion urged by the motion for non-suit. In this respect, if in no other, the plaintiff failed to prove a case sufficient to be submitted to the jury under the allegations of his complaint."

At the conference at which this insurance policy was ordered, Mr. Steinbach told Mr. Knapp that the appellees had bought the dredge in their names, with their money and were the owners thereof. The policy then issued naming the appellees as owners and not in any other capacity. The appellees have alleged in their complaint that they were the owners and an issue has been created on this allegation.

Even if appellees had shown some insurable interest in themselves other than ownership, which they did not, the could not recover on this policy on the basis of the pleadings in this case. The policy names them as owners; they have pleaded that they are owners; they could recover in no other capacity than as owners.

6. Failure of an assured to disclose to the insurer his true interest in any proposed risk, or a misrepresentation by an assured to an insurer of his interest therein avoids a policy of marine insurance.

7 O. C. L. A. 101-1132.
7 O. C. L. A. 101-1134.
Ohl v. Eagle Ins. Co. (C. C. Mass. 1826), 18 Fed. Cas. No. 10,473.
National Oil Transp. Co. v. U. S. (D. C. La., 1927), 18 Fed. (2) 305.
Murphy v. Old Dominion (E. D. N. C.), Fed. Cas. 9945.

In *Ohl v. Eagle Ins. Co.,* 18 Fed. Cas. No. 10,473, the assured sought to recover on a policy for loss of a ship, the papers of which disclosed assured to be a joint owner with one Remington. Assured attempeted by parol to show himself the sole owner. The Court states:

> "No one has a right to say, that the true character of the ship and the representation of the genuine interest of the parties to the insurance are not, or may not be material to the underwriter in estimating his risk * * * In what manner could the underwriters, in this very case, assert an exclusive ownership upon an abandonment against Remington? The effect of the acts of the master, being a part owner, might be very important in the consideration, not only of questions of peril and revenue, but of the general conduct of the voyage. If the underwriter is not put upon any inquiries of this nature by any disclosure of a special interest or special ownership, he has a right to suppose, that the parties deal with him upon the naked avowal of legal titles."

In *Murphey v. Old Dominion Ins. Co.,* Fed. Cas. No. 9,945 beneficiaries of an estate made representation that they were the absolute owners and this was held to vitiate a policy.

The reason the policy was issued to the appellees as owners is that J. L. Steinbach and Captain Corgan ordered it that way. Mr. Knapp said it is not a custom in the insurance business to question the truth of disclosures and representations of this kind (205). There is a good reason for this; the law

is very strict in requiring the truth of a prospective insured in his statement to the agent of the insurance company. The nature of the insured's interest in the subject matter is certainly material to the risk.

The liability of the underwriter is different for different kinds of insurable interests. Where the interest is that of lien claimant, the insurance company is liable only to the extent to which the assured is unable to collect from the debtor, and having paid the loss, is subrogated to the lien. In such a case, in the event of a constructive total loss, the assured would be unable to abandon to the underwriter, because a lien creditor has no title to transfer. Where the interest is ownership, the underwriter is liable for the full amount of the insurance, but in the event of constructive total loss, he would be entitled to such salvage value as might inhere in the vessel. The underwriter is entitled to know where he stands and what interest he is insuring. He is entitled to have the truth told to him as a basis for issuance of the policy.

We might add a line about the quotations from *Cousins vs. Nantes,* supra (34) and that from *Ohl vs. Eagle Insurance Co.* (40) to the effect that on a wagering policy there is no salvage or abandonment. One of the definitions of a wagering policy (O. C. L. A. 101-1119) is a policy made "without benefit of salvage to the insurer."

Let us suppose this dredge on the beach, intact, and a claim by the appellees against the company based on a constructive total loss. Let us suppose that the insurance company has a prospect who is willing to buy the dredge, where is and as is, for one-half of the amount named in the policy, and the company is anxious to pay the claim, accept the abandonment, sell the salvage and reduce its loss by one-half.

Since the appellees did not own the dredge, they could not transfer a good title to the company, which, in turn, could not give a good title to its prospective purchaser. Therefore, the company is in the position of having issued a policy "without benefit of salvage" on a risk where there is a possibility of salvage.

This is one example of the operation of a wagering policy or a policy without benefit of salvage to the insurer.

The prohibition against the issuance of gambling policies rests as heavily upon insurance companies as upon assureds who seek to obtain policies where they have no interest. The law, with good morality and reason, forbids an insurance company from contracting away its possibility of salvage.

It is no answer to the above problem of salvage that Captain Corgan might have joined in a bill of sale to the Wishram under the circumstances outlined. The point is that Captain Corgan, not being

an assured, could not be obligated to join, and nobody knows whether he would or would not have joined.

In this connection, we refer the Court to the case of *Ohl. vs. Eagle Insurance Co.,* ( )

Justice Story saw very clearly the outcome of treating as lawful and binding a policy of marine insurance where the insurable interest rested on nothing more firm than a trust claimed to exist by parol. Such a policy would be a wagering policy.

On the subject of disclosure by the assured please see also the cases cited under point 14 infra.

7. Husband and wife under Oregon law, maintain separate status as regards ownership of property and neither has an insurable interest in the property of the other.

> *Price v. United Pacific Co.,* 153 Or. 259, 56 Pac. (2d) 116.
>
> *Oatman v. Bankers Fire Assn.,* 66 Or. 388, 133 Pac. 1183.
>
> *Mercantile Ins. Co. v. The Orphan Boy* (N. D. Oh.), Fed. Cas. 9431.

The case of *Price v. United Pacific Co.,* 153 Or. 259, was an action by plaintiff on a policy of burglary insurance. The loss was of a diamond ring belonging to plaintiff's wife. The Court, after reviewing authorities, said:

> "It follows from the above that, in our opinion, the complaint does not allege a cause of

> action in favor of Mr. Price, and that the evidence does not disclose one in his favor. He was not the owner of the ring and had no insurable interest in it."

In *Oatman v. Bankers Fire Relief Assn.*, 66 Or. 388, the action was on a fire policy issued to plaintiff covering house and personal property. The evidence disclosed that the deed to the premises went to the plaintiff's wife. The Court held that the insured could not recover as his interest in his wife's property was not an insurable one. The Court said (392):

> "The plaintiff H. M. Oatman has no insurable interest in said real property on which the house was located * * *. A person has an insurable interest in properly only when the conditions are such that he will lose in case the property should be burned (citing authorities).
>
> * * *
>
> "In this state a husband has no insurable interest in his wife's property."

Oregon's Community Property Law is not involved in this case. Chapter 525, Oregon Laws, 1947, went into effect July 5, 1947, long after the facts in this case arose.

Under the Oregon Constitution, Article XV, Section 5, and the married women's property acts of Oregon (O. C. L. A., 63-202 to 206) a married woman of this state owns her property separate and apart from that of her husband, and it is not subject to levy for his debts. She does not, however, have any rights in her husband's separate property, and it is not subject to her debts.

This concept has been clearly established in this state in the above cases defining insurable interest. The husband has no insurable interest in his wife's property, nor has the wife an insurable interest in the husband's property.

The laws of dower and curtesy are not involved here, they relate to real estate and not to personal property. Whether an inchoate right of dower is insurable need not be decided in this case. Certainly if it is, the policy must define it as such. A married woman seeking to insure her inchoate right of dower in her husband's real property cannot do so by representing to the insurance company that her interest is an absolute property right.

8. In Oregon there is no joint tenancy of personal property. Dual or multiple tenancy in personal property is in common.

> *Manning v. U. S. National Bank,* 174 Or. 118, 148 Pac. (2d) 255.
>
> *Nunner v. Erickson,* 151 Or. 575, 51 Pac. (2d) 839.
>
> *Stout v. Van Zante,* 109 Or. 430, 219 P. 804, 220 P. 414.

Is the judgment in this case in favor of the appellees a joint or a several judgment? The answer is not to be found in the judgment itself (54). The Oregon law says they own the judgment in common, one-half to each. The record in the case says something about children in the Steinbach families. Suppose Carolyn Steinbach were to die intestate, would

her children acquire all or one-half of this $11,000 right which has been created in her name by the District Judge out of nothing but family talk. If she has a right in common what is the extent of that right? If a moiety, why? She put up nothing.

9. A part owner has no insurable interest in the shares of other part owners:

Graves v. Boston Mar. Inc. Co., 2 Cranch 419, 2 L. ed. 324.

Murray v. Columbia Ins. Co., 11 Johns (N. Y.) 302.

Even if Frances Steinbach, despite the authority to the contrary, were to be considered as having an insurable interest to the extent of $1650 (and it could not possibly be considered greater) Carolyn Steinbach could not sue upon that interest.

10. One who advances money to another for the purchase of property is merely a general creditor, and does not acquire a lien on the property. This rule holds good where the property thus purchased is maritime in character.

Shooters Island Co. vs. Standard Shipbuilding Corp (C. C. A. 3, 1923), 293 Fed. 706.

The Guiding Star (D. C. Ohio, 1883), 18 Fed. 263.

The Sarah Harris (C. C. N. Y., 1876), 21 Fed. Cas. No. 12,346.

John L. and David E. Steinbach advanced money to Captain Corgan to buy and insure the dredge, but

did not thereby acquire any lien upon the dredge. Frances Steinbach advanced money to the two Steinbach men to aid them in making their advances. She did not thereby acquire any lien on the dredge.

11. A general creditor of an owner of property has no insurable interest in the property.

> *Vancouver National Bank v. Law Union Ins. Co.* (C. C. Or. 1907), 153 Fed. 440.
>
> *American Equitable Assur. Co. v. Powderly Coal Co.*, 221 Ala. 280, 128 So. 225.

In *Vancouver National Bank v. Law Union Co.* (D. Or.), 153 Fed. 440, one Cone doing business as a lumber company obtained a policy of insurance and had it made payable to the plaintiff bank who was his general creditor. The Court states:

> "It is first contended that the plaintiff cannot recover, for the reason that it is without an insurable interest in the property covered by the policy of insurance. Under the testimony, and by the explicit admission of the parties, the plaintiff had not at the date of the policy, nor has it now, any other interest in the subject of the insurance except as a general creditor. It had not then, nor has it now, any mortgage or judgment but holds the promissory notes of Cone * * * for moneys loaned or advanced, so that it stands absolutely as a general creditor * * * without an insurable interest."

In *American Equitable Assur. Co. v. Powderly Coal Co.*, 221 Ala. 280, the Alabama Court in an ac-

tion on a fire policy stated the rule:

> "It is further recognized in this state that a simple contract creditor without a lien of any character, * * * has not an insurable interest in the property of his debtor."

The two Steinbach men, as co-partners in the Steinbach Iron Works, are general creditors of Captain Hugh Corgan and his son, doing business as Coast Dredging & Construction, Ltd., to the extent of $9,446.26 (222). Frances Steinbach is a general creditor to the extent of $1,650.00 of Steinbach Iron Works (Exhibit 7 (4) 223; Exhibit 7 (11) and 7 (14) 223). Captain Hugh Corgan took the title to the dredge from the government and held that title up to the time of the loss. Under the general creditor authorities, above cited, the Steinbach men had no insurable interest in the dredge, and even if they had owned the dredge, Frances Steinbach would have no insurable interest in it. Carolyn Steinbach was not a general creditor of anybody.

Aside from all this, the policy was issued to the two ladies as owners of the dredge, not as creditors of anybody, and they alleged in their complaint that they were the owners of the dredge.

12. Where the claim of a creditor is secured by a lien upon the debtor's property the creditor's lien interest is insurable, but upon the destruction of the property by a peril insured against, the assured creditor cannot recover from the insurer without alleging and proving that the debtor has no other prop-

erty out of which the creditor can recover the amount of his claim, for only under these conditions can the assured be said to have suffered from the destruction of his debtor's property.

> *Spare v. Home Mutual Ins. Co.* (D. C. Ore.), 15 Fed. 707.

In *Spare v. Home Mutual Ins. Co.,* 15 Fed. 707, the action was to recover on a fire policy. Plaintiff obtained and docketed a judgment against Lurch, who owned a warehouse, and thereafter secured from defendant a policy of insurance on the warehouse. The warehouse was burned.

Judge Deady said:

> "The contract for insurance being one for indemnity only it follows that, while the judgment creditor may insure himself against loss by injury from the fire to the whole or any part of his security, — the property upon which his judgment is a lien, — yet before he can recover on such contract as for a loss sustained by the peril insured against it, it must appear that at the time of the fire the amount of the judgment could not have otherwise been made on an execution against the property of the judgment debtor. If notwithstanding the injury to the debtor's property by fire, he has sufficient left, out of which the judgment may be made, the creditor has sustained no loss, and can recover nothing from the insurer. His contract was against loss to himself by fire, not his debtor."

Judge Deady's decision is significant because it shows how far removed are these appellees from having an insurable interest in the dredge. If Fran-

ces Steinbach had had a lien on the dredge securing her promissory note signed by Steinbach Iron Works, she would have had, at the time of the loss, an insurable interest to the extent of $1,650 only, since the note had been paid down to that figure prior to the loss (223). But, in order to recover on the policy, it would be necessary for her to allege and prove that the two Steinbach men had no other property out of which she could collect the balance of her note. Not only did she not allege this as a fact or offer any evidence in support of it, but John L. Steinbach says she is going to be paid regardless of the outcome of this case (97). Steinbach Iron Works got their settlement from the Maritime Commission prior to June 1945, amounting to $29,000 (118), and the evidence indicates that they were solvent when the loss occurred.

13. This action is not prosecuted by the real party in interest.

> Rule 17 (a) Federal Rules of Civil Procedure. *Capital Fire Ins. Co. v. Langhorne* (C. C. A. 8), 146 Fed. (2) 237.

The case at bar is not one where the policy expressly provides that the loss, if any, shall be payable to some person other than the assured, as such other person's insurable interest may appear. Under our policy, the loss is payable only to the assureds as owners. The case of *Capital Fire Ins. Co. v. Langhorne* (C. C. A. 8), 146 Fed. (2) 237, 243, correctly applies Rule 17a to a situation where a vendee

of real property insured it for the benefit of the vendor as the vendor's insurable interest appeared. This was a contract for the benefit of a third party, valid under Minnesota law, and the Court held that the vendor, suing for his own interest, was the real party in interest under Rule 17a to the extent of his interest.

Captain Corgan had the only interest in the dredge capable of being insured.

The appellees have a judgment for $11,437.50 exclusive of interest, costs and attorney's fees. No evidence whatever tends to show that, if they collect the judgment, they will keep any part of the money. unless by gifts from their husbands. Carolyn Steinbach has nothing coming whatever from anybody. Frances Steinbach will be repaid her $1,650 even if this Court reverses this case. We think it is a fair inference from all the testimony that if this judgment is collected Captain Corgan will pay Steinbach Iron Works $9,446.26 out of the proceeds and will claim the balance.

The appellees are not the real parties in interest.

DISCLOSURE

14. Failure by the assured, during the negotiations for a policy, to disclose to the insurer every circumstance known to him and material to the risk, avoids the policy, even in the absence of intent to deceive.

7 O. C. L. A. 101-1132.
7 O. C. L. A. 101-1133.

Btesh v. Royal Ins. Co. (C. C. A. 2, 1931), 49 Fed. (2) 720

King v. Aetna Ins. Co. (C. C. A. 2, 1931), 54 Fed. (2) 253.

California Rec. Co. v. New Zealand Ins. Co., 23 Cal. App. 611, 138 Pac. 960.
Riley v. Delafield, 7 Johns (N. Y.) 522.

In *King v. Aetna Ins. Co.* (C. C. A. 2), 54 Fed. (2) 253, concealment of over-valuation of a yacht was held to be such as to avoid the policy.

In *Btesh v. Royal Ins. Co.* (C. C. A. 2), 49 Fed. (2) 720, the plaintiff insured a shipment of silk as silk but failed to disclose to the insurance company that he had declared it to the carrier as cotton. This failure voided his policy, it being shown that the carrier ordinarily exercised more care in the custody of silks than with respect to cottons.

The Court stated the rule thus (721):

> "The assured under a marine policy must disclose to the underwriter all the circumstances known to him which materially affect the risk.
>
> * * *
>
> "It is not necessary that the assured should intend a fraud upon the underwriter; his duty is positive to disclose."

John L. Steinbach and Captain Hugh Corgan negotiated the policy on behalf of the appellees. Under the facts of this case, the appellees could not repudiate their authority to act as their agents within the

meaning of O. C. L. A. 101-1133. They withheld from the insurance company "circumstances" which it was their duty to disclose:

First, that the appellees did not own the dredge, but were taking the insurance in their names so that in the event of a loss the creditors of the Steinbach Iron Works could not levy on the money; that Captain Corgan owned the dredge, and it was intended, in the future, that the dredge be owned by a corporation whose stock should be owned 32% to each of the two Steinbach men and Captain Corgan and 4% to J. H. Corgan (Corgan, 137). All of these facts were material to the risk and should have been considered by any prudent underwriter prior to accepting the risk. Mr. Knapp says that if they had been known to him that he would not have issued the policy in the names of the two ladies (198). Whether the company would have accepted the risk at all had these circumstances been disclosed to it does not appear. (See point 6, supra.)

Secondly, appellant contended in the Lower Court that Mr. Steinbach and Captain Corgan did not disclose that the towage was to be made by the fishboat Julia D, instead of the approved tug Umpqua Chief, but the Court has determined that point against appellant on disputed evidence and we do not raise it again.

Thirdly, no disclosure was ever made to the company or its agent that towage was to be made with a hawser "borrowed" from the storage loft of the

Coast Guard (202). If such a disclosure had been made, Mr. Knapp would have insisted upon a survey of the whole venture (202), which would have disclosed that Captain Corgan contemplated towage by a fishboat and not by a tugboat approved by the Board of Marine Underwriters.

We will refer back to the matter of the hawser in a later portion of our brief.

These matters in respect to which there was a failure to disclose, namely, the ownership and financial arrangements, and the borrowed hawser, were circumstances material to the risk which should be considered by a prudent underwriter. Mr. Knapp's testimony (195-203) makes this entirely clear and is undisputed.

15. A misrepresentation by the insured during negotiation of the policy of a matter material to the risk avoids the policy if not true, regardless of whether or not the assured intended to deceive the insurer.

7 O. C. L. A. 101-1134.

Bella S. S. Co. v. Ins. Co. of S. Am. (C. C. A. 4, 1925), 5 Fed. (2) 570.

Wathen v. Public Fire Ins. Co. (C. C. A. 2, 1932), 61 Fed. (2) 962.

Kerr v. Union Mar. Ins. Co. (C. C. A. 2, 1904), 130 Fed. 415.

In *Wathen v. Public Fire Ins. Co.*, 61 Fed. (2) 962, 964, where the insured represented that the vessel

was in port when in fact she had already started her voyage and because of bad weather returned to the breakwater, the Court said:

> "We do not suggest nor do we believe that any fraud was intended by plaintiffs or their broker in the application for the policy, but we hold that in stating that the Lottie was 'in port' there was a misrepresentation sufficient to avoid the policy."

John L. Steinbach and Captain Corgan not only failed to disclose to Mr. Knapp that the dredge was owned by Captain Corgan and that it was contemplated that it should be eventually owned by a corporation, whose stock should be owned by the two Steinbach men and Captain Corgan and his son, but they actually misrepresented the facts in this respect when they represented that the dredge was owned by the two ladies. The statute is entirely clear that misrepresentation of a material circumstance voids the policy regardless of intent to deceive.

SECOND SPECIFICATION OF ERROR: DREDGE UNSEAWORTHY BECAUSE OF DEFECTIVE HAWSER

The court erred:

(1) In failing to hold that the dredge was unseaworthy at the commencement of the voyage in that it was equipped with an insufficient towing hawser.

(2) In failing to deny recovery to the appellees on account of breach of an implied warranty of the pol-

icy that the dredge should be seaworthy at the commencement of the voyage.

(3) In holding that the insufficiency of the hawser with which the towage was attempted was not chargeable to the operators of the dredge.

The appellant in Paragraph XVI of its answer (37) alleges as follows:

> "At the time of said attempted towage of the dredge 'Wishram' from Nehalem Bay to Tillamook Bay, the said dredge 'Wishram' was equipped with said borrowed hawser and the said hawser was insufficient for the purposes of said towage and the said fact was fully known or should have been known to the said Captain Hugh Corgan. Consequently the said dredge was then and there unseaworthy and said unseaworthiness was within the knowledge or privity of the owner or owners of said dredge."

The appellees filed no pleading responsive to this answer; therefore, we are probably to assume that the above allegation is deemed denied.

The Court found as finding of fact VIII (49):

> "That the said suction dredge 'Wishram' was seaworthy at the commencement of the said voyage."

The reason for this finding, as will later appear, is that the Court, as a matter of law, considered the defective hawser to be a part of the equipment of the fishboat, not of the dredge. There is no contradictory evidence on this legal issue.

STATEMENT OF FACTS

In July, 1945, on the towage from Coos Bay to Nehalem Bay the tug Umpqua Chief furnished the hawser which was ample and was a 6-inch hawser (Captain Corgan, 137). The tug also furnished the steel bridle.

Mr. Rathbun surveyed the dredge about October 17, 1945, to determine its fitness for the towage from Nehalem Bay to Tillamook Bay (Rathbun, 188). The dredge had no hawser at the time. Rathbun then thought the towage would be done by the Umpqua Chief with its own hawser.

The day before the towage took place, Captain Corgan and J. H. Corgan made arrangements with Otto Berg, Jr., for the towage. When his deposition was taken, Captain Corgan said he made this arrangement three weeks before the towage and that afterwards he had to wait for the weather (Corgan, 138). At the trial he changed his testimony and claimed he was negotiating with the Faymar, another fishboat, during that period of three weeks (138-139).

Neither Captain Corgan nor J. H. Corgan told anybody on behalf of the insurance company that this towage was to be undertaken with a hawser borrowed from the Coast Guard (Captain Corgan, 148; J. H. Corgan, 162).

On October 31, 1945, just before lunch, the two Corgans drove to Otto Berg's house at Bar View and

proposed the towage (149). Berg said he would do the job for $150 and $25 extra for another man, but that he had no towing hawser (150). Berg asked J. H. Corgan how much the Umpqua Chief would charge, and he said around $500 (Berg, 189).

Since Berg had no hawser, Captain Corgan told him he would undertake to get one. The Corgans had made a bridle by themselves for the dredge (J. H. Corgan, 154). Captain Corgan and his son contacted a man named Ole Johnson about getting a hawser. Johnson was a former member of the Coast Guard station at Garibaldi on Tillamook Bay, and had been discharged (J. H. Corgan, 155).

Captain Corgan said that since Mr. Berg had no tow line (125):

> "No, he had no towlines, so I figured that any towline that the Coast Guard would recommend was good enough for me, and, so, Ole Johnson —he was just retired from the Coast Guard— went in and looked into that and made arrangements for a towline, and he pronounced the towline 'A' Number 1, and it had just been taken off a Coast Guard boat."

Appellees did not produce Ole Johnson as a witness but Captain Corgan said about him and the hawser in question (147):

> "He handled every inch of that line when it went over the boat."

Chief Boatswain Paris was head of the Coast Guard Station. Both Captain Corgan (146) and J. H. Corgan (158) were acquainted with Boatswain

Paris, but neither one of them asked him for the loan of a hawser. Captain Corgan admitted (147):

> "To your knowledge, did Mr. Paris have any knowledge that the hawser was being taken out of the Coast Guard station and used for this towage?
>
> A. I wouldn't say that he did."

J. H. Corgan also admitted the lack of authority to take the hawser, and said (158):

> "Nobody ever gave us permission, no."

After talking to Mr. Berg and rounding up Ole Johnson, the latter and J. H. Corgan and Orville Boster, leverman on the dredge, went to the Coast Guard boat house, which stands on piling in Tillamook Bay at Garibaldi. There is another Coast Guard station on land, up on the hill near the road. These men went to the boat house (157) and up in the loft, where they picked out a hawser (151).

A piece of this line is in evidence and is before this Court as Exhibit 20 (Wyatt, 217; Berg, 218). It shows signs of much wear.

When they had selected the hawser, J. H. Corgan went back and told Otto Berg, Jr., who then came to the boat house with his fishboat, the Julia D. J. H. Corgan returned to the boat house with Boster and the two paid the hawser out of the window from the loft upstairs to the deck of the Julia D below (151-152).

J. H. Corgan testified (161):

"Q. And Berg coiled it on the boat?
A. Yes, sir.
Q. Johnson was not with you that second time?
A. No, sir.
Q. Johnson did not put his hands on any Government property?
A. Not at that time, no, sir."

The Julia D undertook the towage the next day, November 1, 1945, with this hawser, and it broke four or five times (Otto Berg, 190).

The story of the attempted towage appears in appellee's Exhibit 39 (242-248). The distance from Nehalem Bay to Tillamook Bay is only 11 miles. The Julia D started with the dredge at 9:45 a.m., November 1, 1945, and arrived outside Tillamook Bay at 1 p.m., the towline having broken once on the way. The fishboat made several efforts to pull the dredge over the bar and each time the towline broke. The Coast Guard boat stood by all day. At 4 p.m. the Coast Guard boat returned to the boathouse and secured a new 4-inch hawser approximately 600 feet long. By that time the velocity of the south wind had increased, the tide was flooding and the sea was heavy (245). Some time after 6:37 p.m., the dredge was blown onto the north jetty. The new towline then broke and the dredge went to pieces.

It is beyond dispute that the dredge started on this voyage in an unseaworthy condition because of the defective towline "borrowed" from the Coast Guard by the Corgans.

Before the Court made findings of fact and conclusions of law and entered its final decree, the appellant moved to reopen the case for the purpose of admitting testimony of two witnesses, Orth Mathiot (43-44), an experienced tugboatman, and K. A. Webb (45), marine surveyor for the Board of Marine Underwriters. Each of these men made an affidavit (44-45) that he had examined the piece of hawser in evidence in this case (Exhibit 20, p. 217, 218) and would testify that it was insufficient for the purpose of this towage. This is the hawser that broke four or five times (190).

This application was heard by the Trial Court June 23 and was denied upon the sole ground that as a matter of law the hawser was a part of the equipment of the fishboat Julia D and not of the dredge. (This Brief, Appendix B.) (Supplemental Transcript.) (45-46.)

On this branch of the case the evidence is undisputed to the following effect: Otto Berg, Jr., Skipper of the Julia D, had no hawser and furnished no hawser for this towage. Captain Hugh Corgan, manager of the dredge, had no hawser of his own or belonging to the dredge. Through the connivance of Ole Johnson, discharged Coast Guardsman, and without the knowledge of the proper Coast Guard officials, Captain Hugh Corgan and his son arranged to get some old hawser out of the loft of the Coast Guard boat house. Otto Berg, Jr., commenced the towage using this hawser, which broke four or

five times. The breaking of this hawser delayed the voyage and the wind and seas rose. The wind blew the dredge onto the rock jetty.

POINTS, AUTHORITIES AND ARGUMENT

1. A policy of marine insurance may embody both a time policy and a voyage policy.

O. C. L. A. 101-1139.

The policy in suit is such a policy (62). It purported to be effective for a year beginning June 6, 1945. At first the dredge was warranted laid up at Coos Bay (66), then on a voyage from Coos Bay to Nehalem Bay (66), and at Nehalem Bay. Finally the policy covered by indorsement of October 26, 1945, (11,232), on another voyage in tow of the Tug Umpqua Chief from Nehalem Bay to Tillamook Bay.

In this one policy are two time covers interspersed with two voyage covers. The claim in this case is made on one of the voyage covers. The policy sued on is a voyage policy, covering the dredge in tow of the Tug Umpqua Chief from Nehalem Bay to Tillamook Bay.

2. A warranty is a stipulation forming a part of a policy of marine insurance, and is construed as a condition. Warranties unless strictly complied with will invalidate the insurance, regardless of proximateness to any loss.

Snyder v. Home Ins. Co. (D. C. N. Y., 1904), 133 Fed. 848.

Fidelity-Phoenix Ins. Co. v. Chicago Title and Trust Co. (C. C. A. 7, 1926), 12 Fed. (2) 573.

Levine v. Aetna Ins. Co. (C. C. A. 2, 1943), 139 Fed. (2) 217.

In *Snyder v. Home Ins. Co.*, 133 Fed. 848, the action was on a marine insurance policy which contained the provision that the canal boat should have a watchman. There was none. The boat sank from unknown causes. The Court denied recovery stating:

> "In any case of breach of an express warranty in a policy of insurance bars a recovery whether it cause any injury or not."

In *Levine v. Aetna Ins. Co.*, 139 Fed. (2) 217, the action was on a marine policy to recover for loss of life by drowning. The policy provided that the motor boat be equipped with a search light. It was not so equipped. The want of a search light could not have contributed to the drowning. The Court denied liability on the policy, holding:

> "Compliance with the warranty was a condition precedent to liability and afforded a complete defense irrespective of any question of causation."

The Oregon statute codifying the law of marine insurance, of which sections are printed in Appendix A to this brief, includes no section on warranties. However, Section 101-1170 provides that the rules

of the common law, including the law merchant, shall apply to contracts of marine insurance in Oregon except where they are inconsistent with the express provision of the statute. Therefore, we assume that the common law of warranties of marine insurance policies is in force in the State of Oregon. There is certainly nothing within the scope of the Oregon statute which is inconsistent with this set of rules.

See note on English law, Appendix C.

Assuming that the furnishing of a defective hawser by the operators of the dredge for the towage from Nehalem Bay to Tillamook Bay was a breach of an implied warranty of seaworthiness of the dredge at the commencement of the voyage, this would void the policy without a showing that the defective hawser contributed in any way whatever to the loss. However, it is quite clear that the many breaks of the defective hawser did so contribute by so extending the time of the towage until the south wind arose and blew the dredge onto the jetty at the north entrance to Tillamook Bay.

3. The policy in suit is subject to an implied warranty that at the commencement of the towage the dredge was seaworthy.

Hazard's Admin. v. N. E. Marine Ins. Co., 8 Pet. 557, 8 L. ed. 1043.

Eagle Star Ins. Co. v. Geo. A. Moore Co. (C. C. A. 9, 1925), 9 Fed. (2) 296.

City Motor Trucking Co. v. Franklin Ins. Co., 116 Or. 102, 239 Pac. 812.

New Orleans T.-M. R. R. Co. v. Union Marine Ins. Co. (C. C. A. 5, 1923), 286 Fed. 32.

Stetson v. Ins. Co. of North America (D. C. Pa., 1914), 215 Fed. 186.

Carey v. Home Ins. Co., 235 N. Y. 296, 139 N. E. 274.

In *Hazard's Admin. v. N. E. Marine Ins. Co.*, 8 Pet. 557, 579, the action was on a marine insurance policy covering the whaler Dawn on a long voyage in the Pacific. The Dawn struck a rock and it then appeared that the hull was perforated by worms and had become rotten. Denying recovery, the Court said:

> "In every policy there is an implied warranty of seaworthiness, and this is a condition precedent on the part of the insured. The policy does not attach unless the vessel be properly manned and provided with all necessary stores and in all respects fit for the intended voyage. The equipment of the vessel must depend on the nature of the voyage; * * *"

In *Eagle Star Ins. Co. v. Geo. A. Moore Co.* (C. C. A. 9), 9 Fed. (2) 296, the policy covered goods "Whether on board or not on board which may arise from any cause whatever," for a period of one year. Under these circumstances this Court held that a warranty of seaworthiness was not to be implied as to the vessel in which the goods were carried to New Zealand. Justice Rudkin said, however:

> "It will be conceded, of course, that there is an implied warranty of seaworthiness at the

> inception of the voyage as a necessary incident to every contract of marine insurance, * * *"

In *City Motor Trucking Co. v. Franklin Ins. Co.,* 116 Ore. 102, the plaintiff sued on a policy of marine insurance for loss of rock which had spilled from a barge. The Oregon Court denied recovery quoting Hughes on Admiralty (105):

> "In every voyage policy of marine insurance there is an implied warranty that the vessel is in all respects seaworthy, and such warranty can be excluded only by clear provisions of the policy * * *"

The Oregon Court continued in its own language (105):

> "This principle seems to have been unanimously applied by the courts to all cases involving claims under marine insurance policies (citing authorities)."

In *New Orleans T.-M. R. R. Co. v. Union Marine Ins. Co.,* 286 Fed. 32, 34, the evidence disclosed that at the time of loading the cargo, calking in the seams above the water line had been permitted to dry out leaving the seams open. The barge filled with water and sank. The Court said:

> "In policies where the law will imply generally a warranty of seaworthiness, it can only be excluded by terms in writing in the policy in the clearest language. *Arnould on Marine Insurance* § 686."
>
> * * *
>
> "Here the evidence showed that no peril of the river, but the unseaworthiness of the barge

caused the loss. Unquestionably the barge sank from water entering through open seams."

Stetson v. Ins. Co. of North America, 215 Fed. 186, was an action on a marine policy for loss of cargo on board a schooner which started a voyage in a leaky condition. The Court held:

> "There is no principle of marine insurance better settled than the one which declares that in every insurance upon a vessel there is an implied warranty upon the part of the assured that at the time of sailing the vessel shall be seaworthy for the voyage insured. This implied warranty is not confined to the sufficiency of the hull, but in a sailing vessel extends to the soundness of the sails and rigging * * *."

A warranty implied in law is just as real as an express warranty and has the same effect. It is a condition precedent to the attachment of the risk and to liability on the policy. It is not necessary to have a misrepresentation or a failure to disclose as the basis of an implied warranty of seaworthiness. When the owners of a vessel or of a cargo to be loaded thereon talk about insurance on such vessel or cargo with the representative of an insurance company the word "seaworthy" is seldom mentioned and need not be mentioned. The authorities from the earliest time assume that the applicant for insurance intends that the venture shall be seaworthy and that the underwriters so understand and believe. Where the insurance is upon a vessel it is within the power of the applicant for insurance to see that the vessel is seaworthy at the start of a voy-

age by making proper repairs or purchasing proper equipment, *such as a sound hawser.* It is never within the power of the underwriter to do this. The premium is computed and charged on the basis that the assured warrants the vessel to be seaworthy and that the underwriter understands it to be seaworthy.

The Appellate Court may consider the foregoing authorities conclusive on this branch of the case. The operators of the dredge secured the hawser and furnished it for the towage. The operator of the fishboat merely used the hawser furnished by the dredge. By the conduct and actions of the parties the hawser became a part of the equipment of the dredge, and it was no part of the equipment of the fishboat. The hawser was defective; therefore, the dredge was unseaworthy.

However, it may be necessary to answer the point of view put forward by the appellees and the Trial Court. This reasoning is so loose it hardly requires an answer. It is to the effect that the fishboat used the defective hawser and, therefore, although this hawser was furnished by the dredge, the operators of the fishboat as between them and the operators of the dredge became responsible for its defectiveness. The conclusion is made to follow that the operators of the dredge, as between them and the insurance company became absolved from the onus of having furnished the dredge with a defective hawser. In this way the Court blinded himself to the obvious fact that the hawser was a part of the

equipment of the dredge, and ignored the many authorities holding that the policy of marine insurance upon which this case was grounded contained an implied warranty of seaworthiness, which was breached.

If this Court wishes to pursue this subject further, the next group of cases may be of interest.

4. As between tug and tow the former is not an insurer but is required to use due care and skill in the selection of equipment and in the make up and management of the tow.

63 C. J., Sections 55, 58, 65, 69.

Note on Towage, 54 A. L. R. 108 et seq.

5. The use by the operator of a tug of a hawser furnished by the operator of its tow is not negligence in itself, but where the hawser is defective and the tug operator should have discovered the defect by inspecting it before use, he is negligent if he fails to do so.

The Quickstep, 9 Wal. 665, 670.

The Mary J. Kennedy (E. D. N. Y., 1925), 11 F. (2) 623, Aff'd C. C. A. 2, 11 F. (2) 625.

Robitzek & Bro. v. Davis (C. C. A. 2), 297 Fed. 107.

The Sunnyside (C. C. A. 2), 251 Fed. 271.

We can only guess that the Trial Court may have had in mind some of the authorities dealing with negligence as between tugs and tows. Therefore, we have cited the foregoing authorities in which the

operators of tugs borrowed hawsers from the operators of tows.

We do not claim that these cases are in point. They deal with torts as between tug and tow, not breaches of warranty as between assured and insurer. We can readily agree that it was Mr. Berg's duty to the owners of the dredge to examine the hawser very closely, considering where it came from, and that his failure to do so was negligent. Still, that does not change the fact that the operators of the dredge furnished the hawser, and the defects of the hawser constituted unseaworthiness of the dredge.

We do not know what authorities the appellees and the Trial Court could possibly rely on to support the idea that because Otto Berg, Jr., attempted the towage with a defective hawser furnished by the Corgans, the hawser thereby became a part of the equipment of the fishboat, and the implied warranty of seaworthiness of the dredge was fulfilled.

This reasoning makes it appear that Berg's decision to tow with the hawser nullified the Corgans' act of furnishing the hawser. The appellees, if they owned the dredge, were under a definite duty toward the appellant to furnish a sound hawser if they furnished any and this duty could not be modified or canceled by an act of Mr. Berg.

CONCLUSION

We submit that this case should be reversed on either of two grounds: 1—The appellees did not own the dredge and had no insurable interest therein; and 2—The dredge was unseaworthy at the commencement of the voyage and the warranty implied in the policy was thus breached.

Respectfully submitted,

MacCORMAC SNOW,
Attorney for Appellee.

APPENDIX A

O. C. L. A. 101-1119: "Avoidance of wagering or gaining (gaming) contracts.

(1) Every contract of marine insurance by way of gaining (gaming) or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract (a) where the assured has not an insurable interest as defined by this act, and the contract is entered into with no expectation of acquiring such an interest; or (b) where the policy is made 'interest or no interest', or 'without further proof of interest than the policy itself', or 'without benefit of salvage to the insurer', or subject to any other like term; provided, that where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer."

O. C. L. A. 101-1120: "(Insurable interest:) Insurance interest defined.

(1) Subject to the provisions of this act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."

O. C. L. A. 101-1121: "When interest must attach.

(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected. . . .

(2) Where the assured has no interest at the time of the loss, he can not acquire interest by any act or election after he is aware of the loss."

O. C. L. A. 101-1132: "(Disclosure and representations:)

Disclosure by assured; (Circumstance explained).

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

* * *

(5) The term 'circumstance' includes any communication made to, or information received by, the assured."

O. C. L. A. 101-1133: "Disclosure by agent affecting (should read "effecting"—pocket part) insurance.

Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer: (a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him; and (b) every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent."

O. C. L. A. 101-1134: "Representations pending negotiation of contract.

(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk."

O. C. L. A. 101-1139: "Voyage and Time Policies.

Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a 'voyage policy', and where the contract is to insure the subject-matter for a definite period of time the policy is called a 'time pol-

icy'. A contract for both voyage and time may be included in the same policy."

O. C. L. A. 101-1170: "(Application of Common Law and Law Merchant.)

The rules of the common law, including the law merchant, save and except where they are inconsistent with the express provisions of this act, shall continue to apply to contracts of marine insurance."

APPENDIX B

(Beginning with the third line on page 291 of "Transcript of Proceedings" on file with this court and ending with page 293 thereof.)

June 23, 1947

(Further proceedings had in the above-entitled cause as follows):

MR. SNOW: I hand to the Court an application to reopen this case to introduce expert testimony concerning the sufficiency of the hawser involved. My contention is that I believe that nearly any competent towboat man or marine surveyor would testify that this hawser was insufficient to conduct the towage of the dredge, and I think this evidence bears very closely on the last question which your Honor put, the question of the seaworthiness of the dredge.

THE COURT: Mr. Phillips, do you oppose the motion?

MR. PHILLIPS: Yes, your Honor. We do not believe that is material at all.

THE COURT: Do you want to stand on the legal proposition, then?

MR. PHILLIPS: Yes.

THE COURT: All right. I am rejecting your offer. I submit the record is very clear — what Mr. Phillips and I have just said.

MR. SNOW: I would like to have a clear record on that proposition.

THE COURT: Can I make it any more clear than I just have?

MR. SNOW: Mr. Phillips argued that because Otto Berg, Jr., the skipper of the fishing boat, accepted this hawser, that relieves——

THE COURT: You state the position again.

MR. PHILLIPS: My position is that there is no finding as to liability on the part of the

dredge for that hawser under the facts and evidence of this case; that the seaworthiness of the dredge was not based on the hawser in any way.

THE COURT: You mean, it did not include the hawser?

MR. PHILLIPS: No.

THE COURT: Because the hawser was part of the tug's equipment and not of the dredge. I agree with you as to the legal proposition and reject your offer, Mr. Snow, to reopen the case on that basis. That seems to me to make the record.

MR. SNOW: Yes.

THE COURT: In other words, if I heard the testimony you are offering I would deem it material.

MR. SNOW: Yes, I appreciate that.

THE COURT: It seems unnecessary to reopen the case and hear it.

MR. PHILLIPS: There is another thing I might say on the record, and that is I think the insurance company had waived that entirely—

THE COURT: I am holding with you on the first proposition.

MR. SNOW: I understand your Honor is not planning to reopen the case, not because of any lateness in the application?

THE COURT: Correct.

MR. SNOW: I thank the Court.

THE COURT: All right.

APPENDIX C

Implied Warranties Under English Law

Under the English law in a *voyage* policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. *Marine Insurance Act,* 1906, 6 Edw. 7, c. 41, Sec. 39 (1), 2 *Arnould* 1756, also Section 686, 1 *Arnould* 45, Sec. 30, 12th Ed.

Under English law in a *time* policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. *Marine Insurance Act,* 1906 supra, Section 39 (5), 2 *Arnould* 1757, also Section 697, 12th Ed. *Aetna Ins. Co. v. Sacramento Navigation Co.* (C. C. A. 9), 273 Fed. 55, 60.

The defective hawser was furnished by the operators of the dredge. It thus became a part of the dredge's equipment and was no part of that of the fishboat. It rendered the dredge unseaworthy. The loss was on a part of the policy covering a voyage. Under English law the policy would be voided. If the policy is considered a time policy, notwithstanding the voyage indorsement on which the claim is made the policy would still be voided under English law because the assureds were in privity with Cap-

tain Corgan and he with the hawser and the circumstances under which it was "borrowed". The loss is attributable to the defective hawser, because its many breaks lengthened the voyage until evening when the tide flooded and the wind and seas rose.

APPENDIX D

$187.50 in Registry of District Court

There is $187.50 in the registry of the District Court in this case. No question concerning this money is raised by this appeal. However, the Court may desire to know something about it. Therefore, we set forth the following explanation.

The premium which the appellant charged to cover the towage of the dredge from Nehalem Bay to Tillamook Bay was $1,200, of which $1,062.50 was to be returned on safe arrival, or a net of $187.50 (10, 11,232). This premium was paid by Coast Dredging & Construction, Ltd., by check signed on behalf of this Corgan partnership, by J. H. Corgan (240). On November 30, 1945, Mr. Knapp, on behalf of the appellant, in a letter to the appellees (233) pointed out the breach of the express warranty of towage by the Umpqua Chief, and mailed the check of Addison P. Knapp Co. for $187.50 to the appellees. On December 13, 1945, Judge Lonergan returned this check to the Addison F. Knapp Co. (235).

On May 21, 1946, with the filing of the original answer (68) appellant paid this sum of $187.50 into court (48).

On June 17, 1946, appellant took the Tillamook depositions of the members of the Steinbach family and learned the facts about the ownership of the

dredge, and about the hawser (Exhibit 7, p. 77).

The final judgment (53) makes no disposition of this sum of $187.50 which is still in the registry of the District Court. The amount of the decree is determined by deducting from the insured value of the dredge, $12,500, the sum to be returned out of the gross premium in the event of safe arrival, $1,062.50, leaving a balance of $11,437.50.

Under the facts, as developed at the trial, the District Court could make no disposition of this sum of $187.50. The money never belonged to the appellees. It was paid by the Corgans and loaned to them for the purpose by the two Steinbach men, but none of these four parties is under the jurisdiction of this Court.

The Oregon statute does not include any section on the return of premiums. Under the English statute, Section 84 (1, 2 and 3) (2 *Arnould,* 1771) the premium could not be repaid to the appellees in any event because of the fact that their policy is a gaming or wagering policy, and because there was a strong element of deception by Mr. Steinbach and Captain Corgan which induced the appellant to issue the policy to the appellees. Under the Oregon statute, Section 101-1170, the question is to be determined by application of common law. We do not brief the question in detail because it is not raised by this appeal. The money is still in Court and still belongs to the appellant.